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AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

FEDERAL TRADE COMMISSION, PETITIONER,
v.
RAYMOND BROS.-CLARK COMPANY, RESPONDENT.
No. 102.

BRIEF FOR PETITIONER.

STATEMENT.

This case comes to this court on a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, which set aside an order of the Federal Trade Commission directing the respondent to cease and desist from hindering or preventing anyone from the purchase of groceries, provisions, and like commodities, in the course of interstate commerce, direct from manufacturers or producers; or hindering or preventing any manufacturer or producer of or dealer in such commodities, in the course of such commerce, in or from the selection of customers; or influencing or attempting to influence any manufacturer, producer of, or dealer in such commodities, in the course of such commerce, not to accept as a customer anyone with whom such manufacturer, producer, or dealer, in the exercise of a free judgment, has or may desire to have such relationship.

THE FACTS.

Preliminary Statement.

Speaking broadly, this is one of many controversies which have reached the Commission and the courts arising out of developments in the business world which appear to manifest an economic tendency toward a more direct system of distributing the products of factory and farm to the consumers thereof. The tendency has appeared in the establishment of cooperative organizations among dealers for purchasing directly from manufacturers, cooperative selling organizations among farmers, mail-order houses, chains of retail stores, etc. To the extent to which the movement is successful it apparently threatens the profits of those through whose hands the commodities have heretofore passed, and it has, therefore, from the first met the organized and individual opposition of established dealers, retail and wholesale. (*Eastern States Retail Lumber Dealers' Association* v. *U. S.*, 234 U. S. 600; *National Harness Manufacturers' Association* v. *Federal Trade Commission*, 268 Fed. 705; *Wholesale Grocers' Assn. of El Paso, Texas, et al.* v. *Federal Trade Commission*, 277 Fed. 657.) The function of the Government has been confined to removing the artificial obstructions imposed upon interstate commerce as a result of efforts of the contending economic forces, leaving the movement to work itself out in an unrestricted market.

The instant case involves the efforts of a corporation operating a chain of retail grocery stores to purchase in wholesale quantities directly from manufacturers.

If a chain of retail stores can purchase its supplies direct from manufacturers and producers in the same quantities and upon the same terms as those made to jobbers, obviously such stores can sell commodities to the purchasing and consuming public at prices below those made by stores through which commodities are distributed from manufacturer, to wholesaler, to retailer. The public is entitled to any benefits which may be derived from a direct method of distribution by manufacturers or producers to retailers; and if a jobber should prevent a chain of retail stores from purchasing from manufacturers and coerce manufacturers from distributing their products direct to the retailer by threats of the withdrawal of patronage or by other similar means, it is submitted that such practices constitute an unfair method of competition within the intent and meaning of the provisions of section 5 of the Federal Trade Commission Act. The manufacturer should be free to select either of these methods of distribution, or to employ both. The considerations which govern his decision in this matter will presumably be the relative profitableness of these different methods, and this, in turn, is affected chiefly by the volume of business obtainable by using one or the other, or employing both. It

may be urged by jobbers that the most economical method of distribution is through the wholesaler and the retailer to the consumer, but the assumptions lying back of this theory are not always sound. The actual facts are that this depends almost entirely upon a quantity position. It may be to the interest of the manufacturer in certain cases to sell through the wholesaler because of the size of the wholesaler's orders, because the sales effort required to sell a given volume of goods through the wholesaler is much less than that which must be made to sell the same volume direct to retailers, owing solely to the fact that the usual wholesale order is much larger than the usual order given by a retailer. But with the development of large-scale retailing, particularly the mail-order house, chain stores, and cooperative retail associations, the situation has changed, and the Basket Stores Co. was able to and did purchase its supplies in quantities fully as large as those in which wholesalers generally purchased their supplies, and as a result the Basket Stores Co., in the retail branch of its business, absorbed the profit formerly obtained by the wholesaler and was able to pass it along to the consuming public.

Transactions out of which this case arises.

The respondent is a corporation organized under the laws of the State of Nebraska and is engaged in the business generally known as that of a wholesale grocer, with its principal place of business at Lincoln, Nebr. Its business is extensive, the value of

its sales amounting in the aggregate to approximately $2,500,000 annually. (Rec. p. 90.)

The Basket Stores Co. is a corporation organized under the laws of the State of Nebraska and is engaged in the retail and wholesale grocery business. (Rec. p. 57.) At the time of and prior to the issuance of the Commission's complaint in this proceeding it had its principal place of business at Omaha, Nebr., and maintained a warehouse at Lincoln, Nebr., and had 72 retail stores at Omaha, Lincoln, and at other points in the States of Nebraska and Iowa. It purchased substantially all of its supplies direct from manufacturers in States other than Iowa in carload lots or in quantities equivalent to those in which wholesale grocers generally purchased their supplies. Of the commodities distributed by the Basket Stores Co. approximately 10 per cent of the total were sold to retail stores outside its own organization and to restaurants and hotels in wholesale quantities, and approximately 90 per cent of the total of such commodities were sold to the consuming public through the retail stores operated by it. (Rec. p. 58.)

On October 4, 1918, there was shipped from Marion, Ind., by the T. A. Snider Preserve Co. a carload of food products, orders for which had been taken from six customers located at Lincoln, Nebr., and adjacent points. (Rec. p. 27.) That part of the shipment sold to the Basket Stores Co. weighed only 16,251 pounds (Rec. p. 94), or less than the minimum carload, and by combining these goods

with those purchased by the five other customers the aggregate weight was over 61,000 pounds, or more than a minimum carload, which gave the consignees the benefit of the carload freight rate, which is substantially less than the rate would have been for a shipment of less than a carload. As was the custom in such cases, the goods were shipped in what is known as a "pool" car, which was consigned to respondent, and the invoice of the contents of the car was sent to respondent, showing the items purchased by each of the six customers. Of the six consignees five were members of the Iowa-Nebraska Wholesale Grocers' Association, concerning whose right to purchase in wholesale quantities direct from manufacturers respondent made no contention; but when it ascertained that a portion of the goods, more than 26 per cent of the total weight, was consigned to the Basket Stores Co. it immediately protested to the Snider Co. in a letter dated October 8, 1918, and expressed surprise that the goods had been sold to the Basket Stores Co. direct; and the claim was made that the Basket Stores Co. was nothing but a retail store, and a demand was made for a credit slip for the regular jobber's profit on the goods sold to the Basket Stores Co. (Rec. p. 49.) No response was made by the Snider Co. to this demand, and on October 22 two letters were written to the Snider Co. by respondent requesting advice as to the amount it should charge for unloading, checking out, and reshipping the contents of the car, and advising the Snider Co. of the distribution

of the contents of the car, some of which had been received in bad order and was turned back to the railroad company.

The car reached Lincoln, Nebr., on October 10, 1918 (Rec. p. 48), and was "spotted" at the warehouse of the respondent the next day, and some time between October 11 and October 16 the car was unloaded and that portion of the goods going to Beatrice and Nebraska City had been reshipped to these points and the goods which had arrived in bad order were turned back to the railroad company (Rec. p. 88), but the Basket Stores Co. was not notified of the arrival of the goods until November 15 following, or 35 days after the car had been "spotted." The goods consigned to the Basket Stores Co. remained all this time in the warehouse of respondent (Rec. p. 89), although the Basket Stores Co. was greatly in need of the goods to supply its trade (Rec. p. 22). In remitting to the Snider Co. for the goods purchased by it, respondent deducted from the amount of the bill $100 which it designated as "Commission on Basket Stores." (Rec. p. 53.) A controversy arose over this charge between the Snider Co. and the respondent, and on December 16 following respondent wrote to Snider Co. again, in which letter it sought to justify its action in deducting the $100, and reiterated its claim that the Basket Stores Co. did only a retail business and did not operate a wholesale store, and the statement was made that if respondent had known that the Snider Co. had accepted an order

from the Basket Stores Co. direct, the Snider Co. would never have had a dollar's worth of business from respondent, and that, unless its claim for $100 commission on the Basket Stores Co. shipment were allowed, it desired the Snider Co. to give it shipping instructions for all Snider Co. products in the possession of respondent. (Rec. p. 53.) In January, 1919, Mr. T. A. Davis, sales manager for the Snider Co., called on respondent to end, if possible, the controversy which had arisen over the $100 commission, but did not succeed. (Rec. p. 29.)

The Commission's findings as to the facts are supported by evidence.

The Commission's findings as to the facts appear at pages 10 to 13 of the Record and contain all of the material facts of the case. In the court below counsel for the respondent did not question the accuracy of these findings, save in the following particulars:

(*a*) That respondent is a competitor of the Basket Stores Co. (Rec. p. 11);

(*b*) That one line of the business of the Basket Stores Co. is that of a wholesale grocer (Rec. p. 11);

(*c*) That the Basket Stores Co. was in need of the commodities, the delivery of which was delayed by respondent (Rec. p. 12);

(*d*) That respondent protested to the Snider Co. against the sale by it of commodities direct to the Basket Stores Co. (Rec. p. 12); and

(*e*) That respondent ceased to purchase commodities from the Snider Co. (Rec. p. 13).

It is submitted that the testimony of the witness Williams (Rec. p. 58) conclusively shows that in the purchase of supplies it competes with all grocers at Omaha and Lincoln, and that in the sale and distribution of commodities to the extent of 10 per cent of its total volume of business it competes with wholesale grocers, including respondent.

The testimony of the witness King (Rec. p. 22) conclusively shows that the Basket Stores Co. was in need of the goods and was seriously inconvenienced by the failure of respondent to notify them of the arrival of the goods in Lincoln. However, this is not a material point; the Basket Stores Co. had ordered the goods and had paid for them, and it would be absurd to assume that they did not need the goods; but whether they were in immediate need of them or not, they were entitled to have notice of their arrival in Lincoln.

The letters comprising Comm. Ex. 4, 7, and 11 (Rec. pp. 49, 51, and 53) were properly characterized by the Commission as a protest in writing. The letters speak for themselves and undoubtedly any disinterested critic would regard them as containing a protest.

The testimony of the witness Davis (Rec. p. 55) and that of the witness Raymond (Rec. p. 86) is to the effect that no more goods were bought from the Snider Co. after the letters, Exhibits 4, 7, and 11, were sent to the Snider Co.

It is therefore impossible to establish that any portion of the numerous findings by the Commission was not supported by testimony.

Holding of the court below.

The court below held, on these facts, that the respondent had merely exercised its lawful right to select the merchandise it wished to purchase and the persons and corporations from whom it wished to purchase; and any incidental result therefrom injurious to others could not be charged as an unfair method of competition. (Rec. p. 134.)

The questions presented.

The petitioner contends that the court below misconceived the issues in the case, and that the real questions presented are, not whether the incidental injury resulting from a cessation of business relations between the respondent and the Snider Co. is an unfair method of competition, but—

1. Whether a trader may obstruct the due course of interstate commerce by threats of withdrawal of patronage, or by other means, and thereby prevent competitors from purchasing in interstate commerce commodities necessary or desirable for the continuance of their business;

2. Whether a trader, acting alone and not in combination with others, may prevent, or attempt to prevent, competitors or other traders from securing goods by coercing or inducing, or attempting to coerce or induce, manufacturers or producers, through

threats of withdrawal of patronage, or by other means, not to sell goods to such competitors;

3. Whether a trader, acting alone and not in combination with others, may, by threats of withdrawal of patronage, or by other means, coerce or induce, or attempt to coerce or induce, a manufacturer or producer in the selection of customers in interstate commerce;

4. Whether a trader, acting alone and not in combination with others, may, by threats of withdrawal of patronage, or by other means, disrupt the relation of buyer and seller existing between competitors or traders and manufacturers or producers, and prevent the manufacturer or producer from continuing to sell to such traders.

ARGUMENT.

The decision of this court in the *Gratz case* (253 U. S. 421) interpreted the substantive law of the Trade Commission Act as creating two classes of practices which are unfair within the meaning of the statute, first, those which are contrary to good morals because characterized by deception, bad faith, fraud, or oppression, and, second, those which have a dangerous tendency unduly to hinder competition. Subsequently, in *Federal Trade Commission* v. *Beech-Nut Packing Co.* (257 U. S. 441), this court held the "Beech-Nut System of Merchandising" to be an unfair method of competition because of its effect to restrict competition. Again, in *Federal Trade Commission* v. *Winsted Hosiery Co.* (258 U. S. 483),

the use of false brands or labels was held to be an unfair method of competition, the basis of the illegality of the method being its deceptive character. These decisions firmly establish the criteria for the interpretation of the Act.

In the instant case the petitioner contends that the practice attacked falls within both of the classes of practices declared by this court to violate the Act: (1) Because it imposes a burden upon interstate commerce and has a dangerous tendency unduly to hinder competition; (2) because of its oppressive character; (3) because of its unlawful character when tested by common law criteria, which it appears are to be applied in the construction of the Trade Commission Act.

This proceeding involves "involuntary" restraints of trade; and control of the market by respondent need not be shown.

This court has repeatedly held that the restraints of trade prohibited by the Sherman law are of two classes—voluntary restraints of trade and involuntary restraints of trade. Voluntary restraints comprise principally those voluntary combinations, consolidations, or agreements which have the power to disturb the relation of supply to demand, and enhance prices by control of production or of the market. Involuntary restraints are denounced not because the offender controls or can control the market, but because he restricts the liberty of the trader to engage in business and destroys that equality of opportunity the preservation of which this court has declared to be one of the primary

objects of that statute. (*U. S.* v. *Patten*, 226 U. S. 525, 541; *Loewe* v. *Lawlor*, 208 U. S. 274, 293–294; *U. S.* v. *Keystone Watch Case Co.*, 218 Fed. 502; *Steers* v. *United States*, 192 Fed. 1.)

Applying this interpretation of the Sherman Law to the Trade Commission Act, the second class of practices held in the Gratz case to be prohibited by the statute—those having a dangerous tendency unduly to hinder competition—is to be construed as embracing practices which either impose those voluntary restraints which may control the market, or those which restrict the liberty of the citizen to engage in commerce. Indeed, both the history of the development of the laws affecting restraint of trade and the wording of the Federal Trade Commission Act—unfair methods of competition—indicate that the primary purpose was to reach those methods designed to restrict the competitive effort of others, rather than those intended to control the market, though both classes of practices were undoubtedly intended to be included within the operation of the Act.

The instant case involves the legality of practices designed to restrain the liberty of others to engage in commerce.

The practice burdens interstate commerce, hinders competition, and destroys that equality of opportunity to compete which it was the purpose of the Trade Commission Act to preserve.

It is well established under the Sherman Law that the circulation among members of an association of retail dealers of the names of wholesalers engaged

in interstate commerce selling direct to consumers, with the obvious purpose of having such retail dealers refrain from dealing with the wholesalers whose names appear on the list, constitutes an unwarranted obstruction and interference with interstate commerce. (*Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600.)

Referring to the decision in the *Eastern States case*, this court, in *Duplex Printing Press Company* v. *Deering* (254 U. S. 443, 467), says:

> In *Eastern States Retail Lumber Dealers' Association* v. *United States* (234 U. S. 600) wholesale dealers were subjected to coercion merely through the circulation among retailers who were members of the association of information in the form of a kind of "black list," intended to influence the retailers to refrain from dealing with the listed wholesalers, and it was held that this constituted a violation of the Sherman Act. Referring to this decision, the court said, in *Lawlor* v. *Loewe* (235 U. S. 522, 534): "That case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States."

It is settled by these decisions that such a restraint produced by peaceable persuasion is

> as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute.

Under the Trade Commission Act the interference with interstate commerce is unlawful, whether the method is employed by one or by many. No contract, combination, or conspiracy need be present, as in proceedings under the Antitrust Act, but a method which has the prohibited result, i. e., dangerous tendency unduly to hinder competition, is unlawful if employed by any person, partnership, or corporation.

The evidence clearly shows that there was an existing interstate traffic between manufacturers of various States and the Basket Stores Co., and that for the direct purpose of destroying such interstate traffic petitioner sought to induce the Snider Co. to cease selling its products to the Basket Stores Co. Obviously, if respondent's efforts had been successful, there would have been no more sales by the Snider Co. to the Basket Stores Co., and interstate traffic between them would have ceased, the free flow of commerce between the States would have been obstructed, and the trade of the Basket Stores Co. would have been restrained. (See *Swift* v. *United States*, 196 U. S. 375; *Montague* v. *Lowry*, 193 U. S. 38.)

Methods employed oppressive within the Gratz decision.

The method used by the petitioner not only is calculated to hinder competition and therefore falls within the second class of practices condemned by the statute, but also is characterized by oppression as that term is used in the decision in the Gratz case. If a corporation engaged in interstate commerce may employ the strength of its buying power to prevent another from procuring a commodity in interstate commerce upon which the very existence of the latter's business depends, it may follow such practices until the dealer against whom they are directed finds himself unable to purchase any commodities and automatically retires from business. By a similar line of conduct, a rival could not only be prevented from purchasing commodities but from securing advertising space in newspapers and magazines, and the channels of commerce completely closed to him.

Such methods destroy that equality of opportunity to compete in business which it was the great purpose of the Trade Commission Act and of cognate statutes to preserve. (*U. S.* v. *American Linseed Oil Co.*, decided June 4, 1923; *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 323; *U. S.* v. *International Harvester Co.*, 214 Fed. 987.)

This court has held in several decisions that traders should have large freedom of action in the conduct of their own affairs. (*Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568;

Federal Trade Commission v. *Sinclair Refining Co.*, decided April 9, 1923.) It has not held that they should be permitted to coerce the conduct of others, but on the contrary has clearly indicated the line which separates fair competition from that which is unfair. In *Hitchman Coal & Coke Co.* v. *Mitchell* (245 U. S. 229) this court said:

> Defendants' acts can not be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were, their conduct exceeds the bounds of fair trade. Certainly, if a competing trader should endeavor to draw custom from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition.

Again, in *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta* (decided by this court June 11, 1923), the court indicates the character of that fair competition which the law favors and the opposite of which it condemns. It says:

> Country banks are not entitled to protection against legitimate competition. Their loss here shown is of the kind to which business concerns are commonly subjected when improved facilities are introduced by others, or a more efficient competitor enters the field.

Goods are as necessary to the conduct of business as are employees. This is not a case of the employment of superior facilities or efficiency, but of an attempt to destroy a competitor by coercing manufacturers or producers, through fear of loss of patronage, not to sell to him. Such methods have no relation to the conduct of the respondent's business, but constitute a direct attempt to restrict the competition of others.

If the method is unfair, because calculated to have the consequences set forth, it is no defense that the record does not disclose that such consequences have already resulted from its use.

In the *Sears-Roebuck case* (258 Fed. 307) the Court of Appeals for the Seventh Circuit says:

> The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners, representing the Government as parens patriæ, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases.

Similarly, in the *National Harness Manufacturers case* (268 Fed. 705), the court says:

> In view of what has appeared, the criticism of lack of public injury is without force.

The suggestion that no damage has been shown, even if true in fact, is answered by the consideration that the remedy afforded by the statute is preventive, not compensatory.

The use of the methods here employed constitutes an unwarranted interference with the Basket Stores' right at common law to a free market.

It is submitted that on principle the conduct of the respondent constituted an unlawful interference at common law with the right of the Basket Stores Co. to enter the business of a wholesale and retail dealer and to have business relations with any and all persons willing to deal with it. In a long line of decisions it has been held that business men may not combine to prevent others from having business relations with whom they will. In many cases, however, the element of combination or concerted action is not the ground of the decision. In civil cases involving conspiracy, the gist of the action is in most jurisdictions held to be the damage resulting from unlawful acts and not the conspiracy itself, and it has sometimes been expressly held that the means employed to prevent persons from purchasing or selling goods were in themselves actionable.

Martell v. *White* (185 Mass. 255) was an action in tort based upon an alleged conspiracy to injure the plaintiff in his business. The defendants were members of a voluntary association of manufacturers, quarriers, and polishers of granite, one of the by-laws of which association provided that any member having business transactions with any party or concern not a member thereof, and in any way

relating to the cutting, quarrying, polishing, buying, or selling of granite, should for each such transaction contribute at least $1 and not more than $500 to the support of the association. The plaintiff in that case was a quarrier of granite and had enjoyed a large business with some of the members of the association. As a result of fines ranging from $10 to $100 imposed on such members for dealing with him, the plaintiff's business was practically destroyed. Passing the question of the legality of the objects of the association and *considering the means employed to effectuate its objects*, the court held that to compel members of the association to refrain from dealing with the plaintiff by means of fines was unlawful and not justified by competition, saying in part:

> In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or, in other words, they were coerced by actual or threatened injury to their property. It is true that one may leave the association if he desires, but if he stays in, he is subjected to the coercive effect of a fine, to be determined and enforced by the majority. This method of procedure is arbitrary and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but, on the contrary, it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural

or logical relation to the grounds upon which the right to compete is based. * * *

In view of the considerations upon which the right of competition is based, we are of opinion that, as against the plaintiff, the defendants have failed to show that the coercion or intimidation of the plaintiff's customers by means of a fine is justified by the law of competition. The ground of the justification is not broad enough to cover the acts of interference in their entirety, and the interference, being injurious and unjustifiable, is unlawful.

In *Brown & Allen* v. *Jacobs Pharmacy Company*, 115 Ga. 429 (1902), it was held that an association of retail druggists which sought to prevent any druggist who did not maintain prices from securing supplies, was unlawful and that an injunction would lie at the instance of a dealer whose purchases of drugs from wholesalers were sought to be prevented, restraining the members of the association, among other things, from "in any manner threatening or seeking to intimidate wholesalers or proprietors, and so prevent them from selling to plaintiff as a cutter or aggressive cutter, and from conspiring and from seeking to prevent wholesalers or other druggists from dealing with or selling to plaintiff, by direct or indirect threats of cutting off their means of obtaining goods or merchandise, or of causing such means to be cut off, or of causing them injury or loss of custom if they should deal with or supply the plaintiff."

In the course of the opinion the court summarized several decisions relied on as follows:

In *Reg.* v. *Druitt* (10 Cox Cr. Cas. 593) it was held that any combination of persons to stifle and prevent the free use of labor and capital within legitimate bounds is unlawful, and that the law furnishes a remedy therefor. The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much the subject of the law's protection as is his body. * * * In *Olive* v. *Van Patten* (1894) (7 Texas Civ. App. 630), where a petition alleged that defendants, who were lumber dealers, had formed an association and sought to prevent sales by manufacturers or wholesale dealers to any person not a dealer, except a railroad, at points where there was a dealer; that because of the refusal of the plaintiff—a sawmill owner and dealer who was not a member—to join such association and his exercising the right to sell to others than dealers, they had maliciously distributed circulars asking that patronage be withdrawn from the plaintiff until he agreed not to sell to others than dealers, thereby influencing others not to deal with plaintiff, to his injury, it was held to state a good cause of action for damages and injunction. * * *

In *Jackson* v. *Stanfield* (1894) (137 Ind. 592) it was held that a combination of retail lumber dealers to destroy the business of brokers and commission dealers who did not keep a lumber yard with an assorted stock of lumber, by coercing wholesale dealers to refuse to make sales to such brokers, or lose the business of

> the members of such combination, was unlawful, and rendered a member who procured action by the association to the injury of brokers liable to the latter in damages; also that an injunction might be granted against enforcing an illegal agreement of dealers to injure the business of another person.

In some of the cases cited by the court in the *Brown & Allen case, supra*, the element of combination was involved in the decision, while in others the ratio decedendi is not very clear. In this line of cases as a whole, however, there is constant reference to the right of the plaintiff to conduct his business free from the interference of others. The definition of this right and the duty of others not to invade it is not to be found in many of the decisions. But in *Booth & Bro.* v. *Burgess* (72 N. J. Eq. 181), Vice Chancellor Stevenson, brushing aside all questions of combination, of malicious injury, of the wrongful or unlawful character of the particular means, and of the limits of the justification of self-interest, harks back to the basic principle of all tort actions and seeks to ascertain what right of the plaintiff has been invaded and what is the correlative duty of the defendant. He concludes that in such cases the right of the plaintiff is "the right to a free market." The court says in part:

> The primary legal right, which it seems to me should be recognized as belonging to the complainant in the case, may be defined or described as the *right to a free market*. * * *

> We have the right to a free market, which is the right of every dealer, in the full enjoyment of his right to contract, to have all other possible dealers with him left free to deal or not as they may voluntarily elect. Thus recognition is accorded to the "interest which one man has in the freedom of another." (*Jersey City Printing Co.* v. *Cassidy*, 63 N. J. Eq. 759.)
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> The tort exhibited by the violation of the right to a free market consists in coercing the market, i. e., interfering with the right of a particular dealer to enjoy the advantages of *freedom* to deal with him on the part of all who may voluntarily desire to deal with him. * * *
>
> A fourth right, or a wide extension of the right above defined, as the right to a free market, has undoubtedly been involved in if not expressly recognized by the decisions of some courts in strike and boycott cases. This wider right concedes to every man not only a free market but a market where transactions occur naturally according to the ordinary laws of trade and commerce, unaffected not only by coercion but also by persuasions or noncoercive inducements from outside parties applied by them with intent and with the effect to interfere with his dealings and thereby to cause him damage.

Whether this right to a free market be invaded by one or by many, it is equally actionable. In *Booth & Bro.* v. *Burgess*, *supra*, the court points to Lord Lindley's expression in *Quinn* v. *Leathem*, A. C. (1901) 495, 534:

> One man exercising the same control over others, as these defendants do, could have acted as they did, and if he had done so, I conceive that he would have committed a wrong toward the plaintiff for which the plaintiff could have maintained an action.

Respecting the wrongful character of the invasion of one's right to a free market by a single individual, Sir Frederick Pollock, in his "The Law of Torts" (Tenth edition, p. 163), says:

> And since a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so (Lord Lindley in *Quinn* v. *Leathem*), it follows that coercing a man's workmen or customers not to work for or deal with him (as distinguished from refusing to deal with him one's self) is not an exercise of one's own right but a violation of his and actionable if willfully done to his damage. Such a thing is more likely to be done, and likely to be more injurious if done by several persons than by one, but on principle it would seem immaterial if there be one wrongdoer or several.

An expression from a decision by the Court of Appeals of the State of New York in a recent case (*Auburn Draying Co.* v. *Wardell,* 227 N. Y. 1 (1919),) appears to be clearly in accord with the *Burgess case, supra,* and with the opinion expressed by Pollock in the excerpt quoted. The New York court said:

> But there is an important and perceptible distinction, in the realms of justice, civil order,

> and law, between the voluntary acts of an individual, done in the right of personal freedom, the right to do or to refrain from doing, and their injurious effects, and the acts of others, undesired by them, initiated and performed in virtue of the deception, compulsion, or oppression on the part of that individual, and their injurious effects. The individual may lawfully refuse to be employed to drive from his neighbor's field the stray cattle which are destroying the crop, and thus, in effect, coerce the neighbor to drive them himself or permit the destruction; but he can not lawfully prevent, through fraud or other form of dishonesty, or compulsion of any nature, another from becoming the employee for such purpose. He may lawfully do that which he can not lawfully attempt to compel another to do. The one is the exercise of the fundamental right of individual choice and volition; the other is the negation and destruction of the right. In the latter case the individual annihilates as to the others the right which he asserts and maintains for himself, and causes injuries as positively and aggressively as he would did he intentionally disable the other or his industrial resources.

(See also *People* v. *Butler*, 192 N. W. 685.)

In the instant case the Basket Stores Co. had the right at common law to purchase from and to sell to all persons who were willing to have business relations with it, and had the further right to have all persons willing to trade with it left free to do so.

The fact that it combined the business of wholesaling and retailing was not a novelty and was not unlawful, as was held by the Circuit Court of Appeals for the Fifth Circuit in the case of *Wholesale Grocers Association of El Paso, Texas, et al.* v. *Federal Trade Commission* (277 Fed. 657 at 664). When the respondent sought to compel or coerce the Snider Co. not to sell to the Basket Stores Co. and demanded a commission for itself or for some other wholesaler on sales by the Snider Co. to the Basket Stores Co., it invaded the Basket Stores Co.'s legal right to a free and uncoerced market. Its refusal to purchase from the Snider Co. if it continued relations with the Basket Stores Co., coupled with the demand that in the event the Snider Co. continued such relations it should take back from the respondent all goods of its manufacture in its warehouses, was a further effort to coerce the Snider Co. to refrain from business relations with the Basket Stores Co. and was an actionable wrong against the latter company. It matters not whether the effort to prevent the Basket Stores Co. from purchasing as it saw fit was carried out by the respondent alone or in association or collusion with others, it was equally a violation of the Basket Stores Co.'s legal rights and of the right of the public to have the benefit of the competitive prices of the Basket Stores Co. based on purchases of that company in an open and free market.

The purpose of the Trade Commission Act was to insure to all business men and to the public the con-

tinuance of free and fair competition in a free and open market. The effort to prevent the Basket Stores Co. from purchasing the subjects of commerce was coercive in its character and clearly oppressive and illegal.

No question of respondent's right to refuse to deal with others involved in this case.

The foregoing decisions and excerpts therefrom demonstrate the difference between the right of a dealer to exercise his discretion with respect to those with whom he will deal, and his right to interfere with the exercise of a similar privilege in others. The question in the instant case is as to the respondent's right to prevent the Basket Stores Co. from purchasing from others willing to sell to it. Confusion is introduced into these cases by the assumption that because a man may decline to have business relations with a person, he may refuse to sell him save on a condition which destroys the freedom of third parties to an open market. Threats to withdraw patronage unless the buyer will cease selling to third parties accomplish, by the coercive effect of the fear of loss of patronage, the same result which would be accomplished by a contract of sale upon the express condition that designated parties would not be dealt with.

There was an illegal interference with established business relations.

The Basket Stores Co., having established business relations with the Snider Co. satisfactory to both parties, had a legal right to have that relation re-

spected by others, although the continuance of the relation was not secured by contract. In *Truax* v. *Raich* (239 U. S. 33, 38), this court says:

> The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable, although the employment is at will.

Again, in *Hitchman Coal & Coke Co.* v. *Mitchell et al.* (245 U. S. 229, 252):

> In short, plaintiff was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers, although they are under no obligation to deal with him. The value of the relation lies in the reasonable probability that by properly treating its employees, and paying them fair wages, and avoiding reasonable grounds of complaint it will be able to retain

> them in its employ and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great and is recognized by the law in a variety of relations.
>
> See also *International News Service* v. *The Associated Press* (248 U. S. 215, 236) and *American Bank & Trust Co.* v. *Federal Reserve Bank* (256 U. S. 350).

The law of competition affords no sufficient justification for acts of interference of the character here involved. (*Martell* v. *White*, *supra*, *Hitchman Coal & Coke Co.* v. *Mitchell*, *supra*, and cases cited in that decision.)

In the *Gratz case* this court held that practices contrary to good morals, because characterized by deception, bad faith, fraud, or oppression, were within the prohibition of the statute. These are common-law criteria of interpretation. By parity of reasoning competitive methods which are by common-law tests actionable wrongs are also prohibited. It is inconceivable that Congress, when seeking to purge interstate commerce of unfair methods, did not intend to include within its prohibition tortious or otherwise unlawful methods. Not that all unlawful acts are unfair methods of competition, but that competitive acts immediately connected with interstate commerce which are contrary to established principles of lawful competition are also within the prohibition of the statute.

The practice being inherently illegal, no tendency to monopoly need be proven.

The foregoing establishes, we believe, the inherently illegal and oppressive character of the practices involved. Where this is established, it is not incumbent upon the Commission to establish also that the method has been pursued until, as a consequence, monopoly is threatened. The baneful effects of the practice, if its use be persisted in, have been mentioned elsewhere, and if they have not been they appear from a moment's consideration. If this court sustains the court below and places the stamp of its approval upon the practice, it may be employed with impunity not only by this respondent, but by all who desire to use it.

It would appear from the character of the Trade Commission Act that proceedings by the Commission were not intended by the Congress to be punitive, but preventive—to establish rather the legality or illegality of particular methods for guidance in the future than the guilt or innocence of particular parties.

> Sufficient appears in this record and in the presentation of the case to warrant us in expressing the belief that petitioner's business standards were at least as high as those generally prevailing in the commercial world at the times in question; and that the action of the Commission is to be taken rather as a general illustration of the better methods required for the future than a specific selec-

tion of petitioner for reproof on account of its conduct in the past. (*Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307.)

Public Interest.

Respondent urged in the Court below that the case was devoid of public interest and for this reason the Commission's order should be set aside.

To this the petitioner replies that the determination of the existence of public interest has been committed by the statute to the Commission as a matter preliminary to the issuance of a complaint and moving it to action or nonaction.

The Federal Trade Commission Act, in so far as it relates to the existence of public interest, is as follows:

> * * * And if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect. * * * (38 Stat. 719, sec. 5.)

The words "if it shall appear to the Commission" clearly confer upon that body the function of determining when a complaint shall issue. The primary purpose of the provision was to vest in the Commission that discretion with respect to whether it would institute a proceeding in a given set of circumstances which would relieve it of the duty of proceeding in every instance of the use of unfair methods of competition. But for this discretionary power, mandamus would probably lie to compel the Commission

to hear and determine any case of the alleged use of unfair methods of competition (*Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474) however slightly the matter touched the general public. If the Commission should in a given case erroneously determine after hearing that methods of competition are prohibited by the Act, this Court would set aside the order based upon such determination. But if the Court find in a given case that the methods of competition are unfair within the meaning of the Act, it is submitted that it will not set aside the Commission's order on the ground that it should not have heard the matter.

There is ample public interest surrounding the use of the methods of competition involved in the instant case. The right of dealers engaged in interstate commerce to use the methods prohibited by the Commission's order to prevent others from engaging in interstate commerce is to be determined.

It is submitted that the judgment of the Circuit Court of Appeals for the Eighth Circuit should be reversed, and the case remanded with instructions to affirm the Commission's order.

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